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(29,714)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 404

LEWIS & FOX COMPANY, APPELLANT,

vs.

CARL SHERMAN, AS ATTORNEY GENERAL OF THE  
STATE OF NEW YORK, AND JOAB H. BANTON, AS  
DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK

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[fol. 1] **DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK**

In Equity

**LEWIS & FOX COMPANY**, Complainant,  
against

**CARL SHERMAN**, as Attorney General of the State of New York, and  
**Joab H. Banton**, as District Attorney of the County of New York,  
Defendants

**RULE TO SHOW CAUSE**—Filed January 31, 1923

Upon the bill of complaint and affidavit of David L. Podell hereto annexed, duly verified the 12th day of January, 1923, Let the defendants and each of them appear at a stated term of this court to be composed of Judges in accordance with Section 266, Judicial Code amended (Section 1243 of the United States Compiled Statutes) to be held at the United States Court House in the Old Post Office Building on the 29th day of January, 1923, at 10:30 A. M. of that day or as soon thereafter as counsel can be heard and show cause why an order should not be made herein enjoining and restraining the defendant Carl Sherman, as Attorney General of the State of New York, and Joab H. Banton as District Attorney of the County of New York, from instituting proceedings of any kind for any act done or committed or omitted by the complainant, its officers and agents, and why the complainant should not have such other and further relief as to the court may seem just and equitable.

Service of a copy of this order on the defendants on or before the 19th day of January, 1923, shall be deemed sufficient.

Dated New York, January 17th, 1923.

Jno. C. Knox, U. S. D. J.

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[fol. 2] **STATE OF NEW YORK,**  
County of New York,  
City of New York, ss:

**IN UNITED STATES DISTRICT COURT**

**AFFIDAVIT OF D. L. PODELL**

David L. Podell, being duly sworn, deposes and says that he is an attorney-at-law and represents the complainant in the above entitled action. That he has had under consideration Chapters 580 and 581 of the Laws of 1922 of the State of New York which require the

labeling of meat products as kosher or nonkosher in a manner more fully set forth in paragraphs Sixth and Seventh of the bill of complaint annexed hereto. The deponent verily believes that the said enactments are void and unconstitutional in that they deprive the complainant of property without due process of law, in violation of Section 1, Article 14 of the Constitution of the United States and deny to the complainant the equal protection of the law, in violation of Section 1, Article 14 of the Constitution of the United States, and unreasonably interfere with the interstate trade and commerce of the complainant, in violation of Section 8, Article 1 of the Constitution of the United States.

That by reason of the fact that a serious question of constitutional law is involved, it is of the utmost importance and of public concern that this application be speedily heard in order that the rights and interests of the parties may be determined. No previous application has been made for this rule to show cause in this suit.

Wherefore, a rule to show cause is sought returnable within 14 days.

David L. Podell.

Sworn to before me this 12th day of January, 1923. Benjamin S. Kirsh. Benjamin S. Kirsh, Notary Public, New York County, No. 416. Reg. No. 4377. Commission expires March 30th, 1924.

[fol. 3]

# UNITED STATES DISTRICT COURT

[Title omitted]

## BILL OF COMPLAINT

To the honorable judges of the District Court of the United States for the Southern District of New York:

Lewis & Fox Company, of the State of Massachusetts, brings this, its bill of complaint, against Carl Sherman, as Attorney General of the State of New York, and Joab H. Banton, as District Attorney for the County of New York, in the State of New York, and thereupon your orator complains and says:

First. That your orator is a corporation organized under the laws of the State of Massachusetts, with its principal place of business in the City of Boston, State of Massachusetts. That the defendants herein, Carl Sherman and Joab H. Banton, are residents and citizens of the State of New York. That the amount in dispute herein exceeds, exclusive of interest and costs, the sum or value of Three thousand (\$3,000) Dollars.

Second. Your orator further says that on or about the 1st day of July, 1916, it commenced the conduct of a general provision supply

business, which embraces the purchase and sale of various meat [fol. 4] commodities, both raw and prepared, and has conducted said business ever since said date, and is now conducting the same. That said commodities, both raw and prepared, have been sold and shipped by your orator to, into, and through several states in the Union other than the State of Massachusetts, and that large quantities of said meat commodities have, by your orator, been shipped to, into, and through the State of New York, pursuant to sales made by your orator to citizens and residents of said State. That a large portion of the business of your orator consists of sales and shipments of said meat commodities to provision dealers and retailers located within the City and State of New York.

Third. Your orator further shows that for nearly six years last past it has invested large amounts of money in building up and thoroughly establishing within the State of New York, a large and lucrative trade among said dealers and retailers within the State of New York in the said meat commodities, and at present there are many hundreds of such dealers within said state who are buying, carrying in stock, and selling to the public, the said meat commodities prepared and sold by your orator as aforesaid. Your orator's gross annual sales in New York amount to many thousands of dollars.

Fourth. Your orator's plant, wherein such meats are prepared, is under constant and continuous government inspection and supervision. That all of the meat, whether raw or prepared, is inspected [fol. 5] and examined by duly authorized agents of the Department of Agriculture of the Government of the United States from the time it reaches the premises of your orator until it leaves said premises for delivery pursuant to sale or otherwise. Your orator sells, delivers, and ships only such meat, articles or commodities for human consumption as are approved under the laws and regulations of the Department of Agriculture as being clean, pure, wholesome and fit for human food. That any meat or meat commodity, whether raw or prepared, which does not pass a rigid inspection, and which does not receive proper approval under government supervision, is not sold for human food, and your orator therefore says that all of the meats, raw or prepared, which your orator has shipped and continues to ship into the State of New York, are pure, clean, wholesome, and proper food eminently fit and desirable for human consumption.

Fifth. That such meat commodities have come to be used very extensively by the public throughout the State of New York, as well as in other states, and the good name, good will and trade thus established is of very great value to your orator. That the large bulk of the meat sold and shipped by your orator into the State of New York and elsewhere, is wrapped in separate parcels, boxes and barrels bearing the name of your orator inscribed thereon, and your orator has thereby become well and favorably known to the trade and to his customers as producing a desirable wholesome commodity prop-

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[fol. 6] erly inspected and approved under government supervision, and entirely fit and desirable for human consumption.

Sixth. Your orator further shows: That the Legislature of the State of New York at its 1915 session adopted an Act, known as Subdivision 4 of Sec. 435 of the Penal Law, which was duly approved and went into effect on the 1st day of September, 1915, which law provided as follows:

"A person who, with intent to defraud: Sells or exposes for sale any meat or meat preparation, and falsely represents the same to be kosher, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'kosher' in any language, is guilty of a misdemeanor."

Seventh. Your orator further says: That the Legislature of the State of New York, at its 1922 session, passed an Act "to amend the Penal Law in relation to the sale and offering for sale of kosher meat or meat preparations," which act was approved April 11th. 1922, and became Chapter 580 of the Laws of 1922 of the State of New York. That said Act provides:

"Section 1. The penal law is hereby amended by inserting therein a new section, to follow section four hundred and thirty-five, to be section four hundred and thirty-five-a. to read as follows:

"Sec. 435-a. Sale of Kosher Meat and Meat Preparations.—A [fol. 7] person, who, with intent to defraud sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher, whether such meat or meat preparation be raw or prepared for human consumption, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'kosher' in any language; or sells or exposes for sale in the same place of business both kosher and nonkosher meat or meat preparations, either raw or prepared for human consumption, who fails to indicate on his window signs and all display advertising, in block letters at least four inches in height, 'kosher and nonkosher meat sold here'; or who exposes for sale in any show window or place of business both kosher and nonkosher meat or meat preparation, either raw or prepared for human consumption, who fails to display over each kind of meat or meat preparation so exposed a sign in block letters at least four inches in height reading 'kosher meat,' or 'nonkosher meat,' as the case may be, is guilty of a misdemeanor.

"Sec. 2. This Act shall take effect September first, nineteen hundred and twenty-two."

Eighth. Your orator further shows: That the Legislature of the State of New York, at its 1922 session, passed an act to amend the Penal Law in relation to the sale of kosher meat or meat preparation, which act was approved on April 11th, 1922, and thereupon became Chapter 581 of the Laws of 1922 of the State of New York. That said act provides:

"Section 1. Subdivision four of section four hundred and thirty-five of the penal law is hereby amended to read as follows:

[fol. 8] "4. Sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'kosher' in any language; or sells or exposes for sale in the same place of business both kosher and nonkosher meat or meat preparations who fails to indicate on his window signs and all display advertising, in block letters at least four inches in height, 'kosher and nonkosher meat sold here'; or who exposes for sale in any show window or place of business both kosher and nonkosher meat or meat products who fails to display over such meat and meat preparation so exposed a sign in block letters at least four inches in height reading 'kosher meat,' or 'nonkosher meat,' as the case may be.

"Sec. 2. This act shall take effect immediately."

Ninth. And your orator further shows: That the phrase "orthodox Hebrew religious requirements," as used in all of the above enactments, is vague, indefinite, uncertain and incapable of correct and common definition.

Tenth. Your orator further shows: That the said term "kosher" used in all of said enactments is a word of the Hebrew language, and is likewise vague, indefinite, uncertain, and incapable of correct and common definition. That its meaning is essentially based upon the phrase "orthodox Hebrew religious requirements."

Eleventh. And your orator further shows: That where used in a strictly Hebrew religious sense, the term "kosher" may be described as clean, fit, proper, according to the orthodox Hebrew religious requirements, and the term "not kosher" may be described as meaning unclean, unfit and improper according to the orthodox Hebrew religious requirements.

Twelfth. And your orator further shows: That among the hundreds of customers within the State of New York to whom your orator has sold and shipped raw and prepared meat commodities are large numbers of dealers and retailers who sell what may be described, according to their best belief, as kosher and nonkosher meats. That by reason of the confusion and lack of proper definition of the word "kosher," your orator has, in the past, avoided

wherever possible, labeling the merchandise either as "kosher" or "nonkosher," but has been at all times scrupulously careful to sell meats and meat commodities that were pure, clean and proper food for human consumption. That wherever your orator could possibly determine in advance as to whether any meat commodity in his honest belief might be called "kosher," he has sold the same as kosher but not otherwise and it has been impossible for your orator to determine with any degree of certainty, reasonable or otherwise, as to what is or what is not "kosher." Various commodities have been brought to your orator marked or labeled "kosher." That your orator could not possibly have known the process or the origin through which the said meat had been put prior to the time that it was brought to the premises of your orator, and had he known the process through which it had been put, it would be equally difficult, if not impossible, to determine whether the animals from which they [fol. 10] were derived were so slaughtered, or whether they were so prepared after slaughtering as to comply with the orthodox Hebrew religious requirements.

Thirteenth. That your orator is advised by his counsel, and therefore avers, that under the amendments above set forth, all such dealers or retailers who sell both kosher and nonkosher meat commodities in their premises will be obligated to determine which of said products are kosher and which are not kosher, and likewise will be obligated to label or post a sign in four inch block letters upon all such commodities exposed for sale in the same place of business, identifying such individual packages as kosher or not kosher, whichever the case may be. That all such dealers or retailers who sell both kosher and nonkosher meats or meat products will be required to post a sign upon their windows or show windows or in their display advertising, announcing that both kosher and nonkosher meats are sold in the said premises.

Fourteenth. Your orator is further advised and therefore avers, that the defendant Carl Sherman is the duly elected Attorney General of the State of New York, and the defendant Joab H. Banton is the duly elected District Attorney for the County of New York, and therefore the prosecuting officer for said County, and that the said Attorney General and the said District Attorney have threatened to prosecute all complaints against persons or concerns engaged as [fol. 11] dealers, retailers or otherwise in the sale of raw or prepared meat commodities who are charged with violating the provisions of the statutes hereinbefore referred to.

Fifteenth. And your orator further shows: That by reason of the threats of prosecution, and by reason of the fear inspired by the enactments and by the requirements of the above laws, large numbers of complainant's customers when called upon at their peril to determine whether the meats or meat products are kosher or not kosher, and to label the same in accordance with the requirements of the law, have decided and will continue to decide that all of the products sold by your complainant are not kosher. That such de-

termination or decision on the part of said customers has been and will be entirely induced by the fear that some judge or jury might determine that the Rabinical Law or the customs, traditions and precedents of the orthodox Hebrew religious requirements necessitate that even such meats as your orator sells as kosher are not kosher. That as your orator has fully set forth above any such meats or meat products as are sold and shipped from your orator's premises with the label "kosher" thereon, are according to the best information and belief of your orator prepared in strict accordance with what your orator honestly believes to be the orthodox Hebrew religious requirements, in so far as it is humanly possible for your orator to determine what such requirements are. In any event, your orator alleges that all of the meats sold and shipped from the complainant's place of [fol. 12] business are clean, wholesome, proper food commodities carefully inspected and eminently fit and desirable for human consumption.

Sixteenth. Your orator further shows: That the labeling of any meats produced by your orator as not kosher is an unjust, an unwarranted and unreasonable slander upon the property of your complainant.

Seventeenth. Your orator further shows: That by reason thereof he will be irreparably damaged in serious loss, destruction and interference with his trade and good will, and with his name and business reputation. That he will likewise be irreparably damaged in the deprivation and loss of numbers of his customers. That the sales and shipments made by your orator to, into and through the State of New York will thereby be substantially lessened and decreased. That his good will will, in course of time, be destroyed. That his investment of hundreds of thousands of dollars in his plant and in his equipment and his other property, real and personal, of the kind utilized in the conduct of his business will be substantially diminished in value, if not rendered of no value at all.

Eighteenth. And your orator further shows: As he is informed and verily believes that there is very little if any cattle raising within the border of the State of New York. That the percentage of slaughter houses within the border of the State of New York is exceedingly small in comparison with the tremendous demand and [fol. 13] requirements and the quantities of meat of both raw and prepared consumed by the residents of the State of New York. That as your orator is advised and verily believes, more than ninety percent (90%) of the meats consumed within the borders of the State of New York comes and is derived from cattle raised in states other than the State of New York. That as your deponent is advised and verily believes, more than eighty percent (80%) of the meats consumed within the State of New York is derived from animals slaughtered in states other than the State of New York. That in short, the vast bulk of the meats and meat products consumed by the inhabitants and residents of the State of New York must be im-

ported from outside of said State, either from other states of the Union, or from foreign countries.

Nineteenth. And your orator alleges: That it sells and ships into the State of New York from the State of Massachusetts more than Sixty thousand (\$60,000) Dollars worth of meats every year, and that the packers of the country located in states other than the State of New York, likewise ship into the State of New York meats and meat products of the value of hundreds of millions of dollars every year. That the sales made by your orator in the State of New York are made both at the City of Boston in the State of Massachusetts, as well as at points within the State of New York, to be delivered to points within the State of New York to purchasers and consumers within the State of New York in their original unbroken packages.

Twentieth. And your orator further shows: That unless restrained [fol. 14] and enjoined by the order of this Court, said defendants, in their efforts to enforce the foregoing enactments will continue to threaten prosecutions of all those who do not comply with the foregoing requirements, and will thereby intimidate and annoy numerous persons engaged in selling the meats and meat products of your orator within the State of New York, and that their course will be followed by other prosecuting attorneys within the State of New York, and will likewise threaten and procure prosecutions of the persons selling the merchandise of your orator, and the inevitable effect thereof will be to interfere and obstruct the plaintiff in the conduct of his business in the State of New York, causing him great financial loss, interfering with his property rights in said meats and meat preparations, and with his right to vend the same freely in the State of New York, and will thereby inflict great and irreparable injury upon your orator which it will be impossible to compensate in damages or accurately to ascertain, and for which there is no adequate legal remedy. That many of the persons engaged in the sale of plaintiff's said meats and meat products have already discontinued their purchase and sales of said meats and meat preparations because of the fear of criminal prosecution induced by the threats of said defendant as aforesaid, and that large numbers of those who are not handling said meats and meat preparations, and are not buying and selling same in said State, will be hereafter induced by said threats to discontinue the sale thereof, unless the defendants are restrained as aforesaid from threatening such prosecutions, and from all other acts calculated to induce the plaintiff's said customers to believe that by purchasing and selling said meats or meat preparations from your plaintiff without such labels or notices, or by erroneously labeling the same they expose themselves to such threatened prosecution.

Twenty-first. And your orator further shows: That the irreparable injury to and destruction of the property and property rights and the trade and good will of plaintiff's customers, as above set forth, deprive your orator of his property without due process of law in violation of Section 1, Article 14 of the Constitution of the United

States, and that said statute will also deprive said plaintiff of his right to vend and sell within the State of New York and sell his products in the State of New York, which right of itself is property of great value without due process of law, and in violation of said Section 1, Article 14 of the Constitution of the United States.

Twenty-second. And your orator further avers: Said acts of the Legislature of the State of New York, fully above set forth, are void because contrary to and in violation of so much of Section 1, Article 14 of the Constitution of the United States as provides that no state shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law.

Twenty-third. And your orator further shows: That said enactments fully above set forth are also in violation of so much of Section 8 of Article 1 of the Constitution of the United States as confers upon the Congress of the United States the power to "regulate commerce with foreign nations and among the several States and with the Indian tribes," and in that said act and each of said sections will, if enforced, unreasonably interfere with commerce between the several states, and will, as heretofore alleged, interrupt and destroy the interstate commerce in which your complainant alleges he is largely engaged as aforesaid.

Twenty-fourth. And your orator further shows and states to the Court: That such meats and meat preparations herein referred to have been for years past and are put up and are for sale in several different size packages.

Twenty-fifth. And your orator further shows and states to the Court that a large portion of said meats and meat preparations, herein referred to, have been for years past and now are put up and offered for sale in several different size packages, all of which have come to be commonly known to the trade in general as identifying the goods of your orator's manufacture and preparation. That the varied shapes and sizes of the several packages thus employed require the use of varying labels, designs, etc., all of which have come to be well and commonly known to the trade as identifying the commodity of your orator's manufacture, and all of which have been prepared by your orator at great expense to accommodate the carrying on of such business, and under the enactments above set forth, it will be necessary, for purposes of identification, to label all packages sold by your plaintiff either as kosher or nonkosher. That the requirement of such character on each of the packages so sold constitutes the imposition of an undue burden on articles which are the subject of interstate commerce, and prevents the sale of such articles of interstate commerce, all of which is a violation of Section 1, Article 14 of the Constitution of the United States, as well as Section 8, Article 1, of the Constitution of the United States. That the vagueness and uncertainty and the impossibility to define and determine what is meant by the phrase "orthodox Hebrew religious re-

quirements," or by the word "kosher," or by the words "not kosher," renders it impossible for any citizen to know or understand when he is or when he is not committing a violation of such statute, or when he is or is not subjecting himself to criminal prosecution under such statute, and that in any instance when your deponent sells or exposes for sale within the State of New York to a consumer any of his meat products for shipment from the State of Massachusetts into the State of New York, it will be impossible for your orator to determine when he is and when he is not committing a violation of said statute or subjecting himself to criminal prosecution, and in that regard, said statute violates Section 1, Article 14 of the Constitution of the United States.

Twenty-sixth. And your orator further shows: That unless a temporary injunction is issued in this cause prohibiting and restraining the defendants from doing any of the acts complained of herein pending a suit and until a final hearing thereof, said defendants [fol. 18] will, before such final hearing, have consummated and accomplished said acts or threatened acts in whole or in part, and will have seriously interfered with and substantially destroyed plaintiff's said business and good will in the State of New York, thereby rendering any relief which the Court might otherwise grant upon a final hearing ineffective and of no avail.

Now, therefore, the premises being considered, may it please the Court to grant unto your orator a writ of subpoena commanding the defendants at a day therein to be inserted, to be and appear before this Honorable Court, there to answer without oath (their oaths being hereby expressly waived), and all singular of the premises, and to do and abide by such order and decree as this Honorable Court shall make therein; and until a final hearing of said cause, for as much as by reason of the premises the defendants will, unless restrained by order of this Court take such action in the premises as will greatly injure and destroy the rights of your orator before a final hearing can be had upon the merits of this cause; and your orator further prays that your Honors will, pending said final hearing, grant a temporary injunction after proper notice of a hearing of this application for a temporary injunction at such time as your Honors shall designate, restraining and forbidding the defendants, their agents, assistants and attorneys from taking any action in the premises or from instituting any proceeding against your orator, his employees, agents or representatives, his customers or any one [fol. 19] dealing with or selling the said meats or meat products for any alleged failure to comply with the requirements of said enactments, and enjoining and prohibiting the said defendant, during the pendency of this suit and until the final hearing and determination thereof, from making any threats of prosecuting or from conducting any prosecutions of any and all persons by reason of their failure to label any of the meats sold by your complainant as "not kosher," or by reason of their failure to exhibit a four inch block letter sign or any sign upon the meats or meat products sold by your complainant bearing the words "not kosher," or from in any manner interfering or seeking to prevent the full, free and unhamp-

ered sale of the products of your orator within the State of New York without labeling or designating the same as "not kosher," and from injuring the business of your complainant by compelling it to be discredited in standing and reputation, and by having its merchandise branded as "nonkosher," in accordance with the requirements of said enactments.

And will your Honors grant unto your orator all such further relief as may be just and equitable in the premises.

David L. Podell, Solicitor for Complainant.

[fol. 20] Jurat showing the foregoing was duly sworn to by Benjamin Fox omitted in printing.

[fol. 21] [File endorsement omitted.]

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[fol. 22] DISTRICT COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AMENDING BILL OF COMPLAINT—Filed Feb. 24, 1923

It is hereby stipulated and agreed by and between the Attorneys for the respective parties hereto that the first sentence of paragraph marked "Second" in the case entitled *Lewis & Fox Company vs. Carl Sherman, et al.*, be amended so as to read as follows:

"Second. Your orator further says that on or about the 1st day of July, 1916, it commenced the conduct of a general provision supply business which embraces the purchase and sale of various meat commodities, both raw and prepared, which to your orator's honest information and belief are kosher, and has conducted said business ever since said date, and is now conducting the same."

In other respects the allegation set forth in paragraph "Second" remain unamended.

It is further stipulated and agreed that any notices, papers, exhibits and affidavits submitted in any one of the suits above named shall be deemed to be before the Court in all of the said suits.

Dated New York, February 19, 1923.

David L. Podell, Solicitor for Complainant. Carl Sherman, as Attorney General, etc., by Samuel Hofstadter, Solicitor for Carl Sherman, etc. John Caldwell Myers, Solicitor for Joab H. Banton, etc.

[fol. 23] DISTRICT COURT OF THE UNITED STATES, SOUTHERN  
DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF MOTION—Filed Feb. 14, 1923

SIRS: Please take notice that the motion to dismiss the bill of complaint herein has this day been filed in the District Court of the United States for the Southern District of New York, in the office of the Clerk of the said Court, and that the said motion will be set down for hearing and brought on for argument at a term of the said Court, constituted pursuant to §266 of the Judicial Code, to be held at the Old Post Office in the City and County of New York, Southern District of New York, on the — day of February, 1923, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated New York, February 13, 1923.

Yours, etc., Carl Sherman, Attorney General of the State of New York. Samuel H. Hofstadter, Solicitor for Defendant Carl Sherman, as Attorney General of the State of New York, 60 Wall Street, New York.

To Podell, Ansorge & Podell, Esqrs., Solicitors for Complainant, 233 Broadway, New York City.

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[fol. 24] DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION TO DISMISS BILL OF COMPLAINT

Now comes the defendant, Carl Sherman as Attorney General of the State of New York, and upon the bill of complaint herein moves that the said bill of complaint be dismissed for the following reasons and upon the following grounds, to wit:

I. That it appears upon the face of the bill of complaint that the facts stated therein are insufficient to constitute a cause of action in equity.

II. That it appears upon the face of the bill of complaint that the complainant has a plain, adequate and complete remedy at law.

III. That it does not appear upon the face of the bill of complaint, and no sufficient facts are averred therein to show, that the intervention of a court of equity and the assumption of jurisdiction by such a court is necessary or essential in order to effectually pro-

teet the property or rights of property of the complainant from great and irreparable injury or from any injury whatsoever.

[fol. 25] IV. That Chapter 233 of the Laws of 1915, as amended by Chapter 581 of the New York Laws of 1922 (Penal Law, §435, subd. 4) is a valid statute, duly passed by the Legislature of the State of New York, in the due exercise of its lawful and constitutional powers and does not violate any of the provisions of either Article 1, §8 of the Constitution of the United States or the Fourteenth Amendment to such Constitution; and it does not appear from the face of the bill of complaint or from the facts averred therein that the said statute, or the enforcement thereof by the State of New York by and through its governmental and administrative agencies, operates or will operate to deprive or deny the complainant of the equal protection of the laws, or to deprive him of liberty or of any property or rights of property without due process of law.

V. That Chapter 580 of the New York Laws of 1922 (Penal Law §435-a) is a valid statute, duly passed by the Legislature of the State of New York, in the due exercise of its lawful and constitutional powers and does not violate any of the provisions of either Article I, §8 of the Constitution of the United States or the Fourteenth Amendment to such Constitution; and it does not appear from the face of the bill of complaint or from the facts averred therein that the said statute, or the enforcement thereof by the State of New York by and through the governmental and administrative agencies, operates or will operate to deprive or deny the complainant of the equal protection of the laws, or to deprive him of liberty or of any property or rights of property without due process of law.

[fol. 26] VI. That it appears upon the face of the bill of complaint that to grant the relief sought by the complainant would constitute an unlawful and unconstitutional interference by the agencies of the Government of the United States with the lawful and constitutional power, right and duty of the State of New York and its governmental agencies (including the Attorney General of the State of New York) to prosecute violations of criminal statutes of the State of New York.

VII. That it appears on the face of the bill of complaint that the complainant is not within the class of persons who are or may be injured by the alleged unconstitutionality of the provisions of the statutes set forth in the bill of complaint.

VIII. That it appears upon the face of the bill of complaint that this court is without power or authority to grant the relief or to render the judgment and decree prayed for.

IX. That no sufficient facts are alleged in the bill of complaint to warrant or justify the granting of the relief prayed for or any other equitable relief.

Wherefore, for the reasons and upon the grounds aforesaid, the defendant, Carl Sherman, as Attorney General of the State of New York, respectfully moves this Court that the bill of complaint herein be dismissed as to him.

Dated New York, February 8th, 1923.

Carl Sherman, Attorney General of the State of New York.  
Samuel H. Hofstadter, Soliictor for Defendant Carl Sherman, as Attorney General of the State of New York, No. 60 Wall Street, New York City.

[fol. 27] [File endorsement omitted.]

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[fol. 28] UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION—Filed March 26, 1923

SIRS: Please take notice that the annexed motion to dismiss the bill of complaint herein has this day been filed in the District Court of the United States for the Southern District of New York in the office of the Clerk of the said Court and that the said motion will be set down for hearing and brought on for argument at a term of the said Court, constituted pursuant to §266 of the Judicial Code, to be held at the Old Post Office in the City and County of New York, Southern District of New York, on the 19th day of February, 1923, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated New York, February 14, 1923.

Yours, etc., Joab H. Banton, District Attorney in and for the County of New York. John Caldwell Myers, Solicitor for Defendant, Joab H. Banton.

To Messrs. Podell, Ansonage & Podell, Solicitors for Complainant, 233 Broadway, New York, N. Y.

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[fol. 29] DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION TO DISMISS BILL OF COMPLAINT

Now comes the defendant, Joab H. Banton, as District Attorney of the County of New York, and upon the bill of complaint herein

moves that the said bill of complaint be dismissed for the following reasons and upon the following grounds, to-wit:

1. That it appears upon the face of the bill of complaint that the facts stated therein are insufficient to constitute a cause of action in equity.

2. That it appears upon the face of the bill of complaint that the complainant has a plain, adequate and complete remedy at law.

3. That it does not appear upon the face of the bill of complaint, and no sufficient facts are averred therein to show, that the intervention of a court of equity and the assumption of jurisdiction by such a court is necessary or essential in order to effectually protect the property or rights of property of the complainant from great and irreparable injury or from any injury whatsoever.

[fol. 30] 4. That it appears on the face of the bill of complaint that the complainant is not within the class of persons who are or may be injured by the alleged unconstitutionality of the provisions of the statutes set forth in the bill of complaint.

5. That Chapter 233 of the Laws of 1915, as amended by Chapter 581 of the New York Laws of 1922 (Penal Law, §435, subd. 4) is a valid statute, duly passed by the Legislature of the State of New York, in the due exercise of its lawful and constitutional powers and does not violate any of the provisions of either Article I, §8 of the Constitution of the United States or the Fourteenth Amendment to such Constitution; and it does not appear upon the face of the bill of complaint or from the facts averred therein that the said statute, or the enforcement thereof by the State of New York by and through its governmental and administrative agencies, operates or will operate to interfere unwarrantably with commerce between the several states, or to deprive or deny the complainants of the equal protection of the laws, or to deprive it of liberty or of any property or rights of property without due process of law.

6. That Chapter 580 of the New York Laws of 1922 (Penal Law §435-a) is a valid statute, duly passed by the Legislature of the State of New York, in the due exercise of its lawful and constitutional powers and does not violate any of the provisions of either Article I, §8 of the Constitution of the United States or the Fourteenth Amendment to such Constitution; and it does not appear upon the face of the bill of complaint or from the facts averred therein that the said statute, or the enforcement thereof by the State of New York by and through the governmental and administrative agencies, operates or will operate to interfere unwarrantably [fol. 31] with commerce between the several states, or to deprive or deny the complainant of the equal protection of the laws, or to deprive it of liberty or of any property or rights of property without due process of law.

7. That it appears upon the face of the bill of complaint that to grant the relief sought by the complainant would constitute an unlawful and unconstitutional interference by the agencies of the Government of the United States with the lawful and constitutional power, right and duty of the State of New York and its governmental agencies (including the District Attorney of the County of New York) to prosecute violations of criminal statutes of the State of New York.

8. That it appears upon the face of the bill of complaint that this court is without power or authority to grant the relief or to render the judgment and decree prayed for.

9. That no sufficient facts are alleged in the bill of complaint to warrant or justify the granting of the relief prayed for or any other equitable relief.

Wherefore, for the reasons and upon the grounds aforesaid, the defendant, Joab H. Banton, as District Attorney of the County of New York, respectfully moves this Court that the bill of complaint herein be dismissed as to him.

Dated February 14, 1923.

Joab H. Banton, District Attorney of the County of New York. John Caldwell Myers, Solicitor for defendant Joab H. Banton, as District Attorney of the County of New York, 32 Franklin Street, New York, N. Y.

[fols. 32-53] [File endorsement omitted.]

[fol. 54] UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING INJUNCTION AND DISMISSING BILL OF COMPLAINT—Filed April 25, 1923

This cause having come on to be heard on the order to show cause why a preliminary injunction should not issue as prayed for in the bill of complaint and on the motions made by the respective defendants to dismiss the bill of complaint, and the Court having heard the arguments of David L. Podell, Esq., Solicitor for the Complainant, Samuel H. Hofstadter, Esq., Solicitor for the defendant Carl Sherman, as Attorney General of the State of New York, and John Caldwell Myers, Esq., solicitor for the defendant Joab H. Banton, District Attorney of New York County, and due deliberation having been had, it is

Ordered that the motion for an injunction pendente lite be and it hereby is denied; and it is

Further ordered that the bill of complaint herein be and it hereby is dismissed.

Dated New York, April 25th, 1923.

Enter.

Martin T. Manton, C. J. Learned Hand, D. J. Jno. C. Knox, D. J.

[fol. 55] [File endorsement omitted.]

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[fol. 56] UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR AND ORDER ALLOWING APPEAL—Filed May 1, 1923

To the Honorable Julian W. Mack, U. S. Circuit Judge:

The above named appellant respectfully shows:

That it considers itself aggrieved by the order made and entered in the United States District Court for the Southern District of New York, on the 25th day of April, 1923, in the office of the Clerk of this Court, denying the motion for an injunction pendente lite and dismissing the bill of complaint and does hereby petition for an appeal from said order and decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors herewith and prays that an appeal may be allowed and citation granted and directed to the defendants herein and all other parties in interest, commanding them and each of them to appear before the Supreme Court of the United States.

Dated New York, April 26th, 1923.

Lewis & Fox Company, by David L. Podell, Solicitor for Complainant, Office & P. O. Address 233 Broadway, Borough of Manhattan, New York City.

The foregoing appeal and petition therefor is hereby allowed.

Dated New York, May 1, 1923.

J. W. Mack, U. S. Circuit Judge.

[fol. 57] [File endorsement omitted.]

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[fol. 58] UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed May 1, 1923

SIRS: Please take notice that Lewis & Fox Company, feeling itself aggrieved by the order and decree made and entered herein dated

the 25th day of April, 1923, hereby appeals to the Supreme Court of the United States, to be holden at the Capitol, in the City of Washington, in the District of Columbia, from the said order denying the motion for an injunction pendente lite and dismissing the bill of complaint and from each and every part of said order.

Dated New York, April 26th, 1923.

David L. Podell, Solicitor for Complainant, Office & P. O. Address 233 Broadway, Borough of Manhattan, New York City.

To Samuel H. Hofstadter, Esq., Solicitor for Carl Sherman, as Attorney General of the State of New York, Office & P. O. Address 60 Wall Street, New York City. John Caldwell Myers, Esq., Solicitor for Joab H. Banton, as District Attorney of the County of New York, Office & P. O. Address 32 Franklin Street, New York City.

[fol. 59] [File endorsement omitted.]

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[fol. 60] UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed May 1, 1923

Comes now the complainant and files the following Assignment of Errors upon which it relies for its appeal from the decree made by this Honorable Court on the 25th day of April, 1923, in the above entitled action dismissing the complainant's bill and denying to it the relief prayed for.

1. That the Court erred in denying the application for an injunction pendente lite.

2. That the Court erred in dismissing the bill of complaint.

3. That Chapter 580 of the Laws of 1922 is so vague, indefinite and uncertain as to be a violation of the constitutional rights of the complainant under Section I, Article XIV of the Constitution of the United States.

4. That Chapter 581 of the Laws of 1922 is so vague, indefinite and uncertain as to be a violation of the constitutional rights of the complainant under Section I, Article XIV of the Constitution of the United States.

[fol. 61] 5. That Chapter 233 of the Laws of 1915 is so vague, indefinite and uncertain as to be a violation of the constitutional rights of the complainant under Section I, Article XIV of the Constitution of the United States.

6. That Chapter 580 of the Laws of 1922 involves a stigmatization of the complainant's goods and thus destroys their value which is a deprivation of property within the meaning of Section I, Article XIV of the Constitution of the United States.

7. That Chapter 581 of the Laws of 1922 involves a stigmatization of the complainant's goods and thus destroys their value which is a deprivation of property within the meaning of Section I, Article XIV of the Constitution of the United States.

8. That Chapter 580 of the Laws of 1922 denies the complainant the equal protection of the law and is thus in violation of Section I, Article XIV of the Constitution of the United States.

9. That Chapter 581 of the Laws of 1922 denies the complainant the equal protection of the law and is thus in violation of Section I, Article XIV of the Constitution of the United States.

10. That Chapter 233 of the Laws of 1915 denies the complainant the equal protection of the law and is thus in violation of Section I, Article XIV of the Constitution of the United States.

11. That Chapter 580 of the Laws of 1922 imposes an undue and unreasonable burden upon articles which are the subject of Interstate Commerce and is therefore in violation of Section VIII, Article I of the Constitution of the United States.

[fol. 62] 12. That Chapter 581 of the Laws of 1922 imposes an undue and unreasonable burden upon articles which are the subject of Interstate Commerce and is therefore in violation of Section VIII, Article I of the Constitution of the United States.

13. That Chapter 233 of the Laws of 1915 imposes an undue and unreasonable burden upon articles which are the subject of Interstate Commerce and is therefore in violation of Section VIII, Article I of the Constitution of the United States.

In order that the foregoing Assignment of Errors may be and appear of record, the complainant presents the same to the Court, and prays that such disposition be made thereof as in accordance with the laws and the statutes of the United States in such cases provided, and the complainant prays for a reversal of the decretal order and decree of dismissal made and entered by said Court.

David L. Podell, Attorney and Solicitor for Complainant, Office & P. O. Address 233 Broadway, Borough of Manhattan, New York City.

[fol. 63] [File endorsement omitted.]

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[fol. 64] CITATION IN USUAL FORM SHOWING SERVICE ON CARL SHERMAN—Filed May 3, 1923, and omitted in printing

[fol. 65] [File endorsement omitted.]

[fol. 66] DISTRICT COURT OF THE UNITED STATES

[Title omitted]

STIPULATION EXTENDING TIME

It is hereby stipulated and agreed by and between the Attorneys for the respective parties hereto that the return day of the Citation in the above entitled case be extended from May 31st, 1923, up to and including June 15th, 1923.

Dated New York, May 29th, 1923.

David L. Podell, Solicitor for Complainant. John Caldwell Myers, Solicitor for District Attorney Joab H. Banton. Samuel Hofstadter, Solicitor for Attorney General Carl Sherman.

The foregoing is consented to.

Dated New York, May 31st, 1923.

Alex. Gilchrist, Clerk.

[fols. 67 & 68] BOND ON APPEAL FOR \$500—Filed June 1, 1923;  
omitted in printing

[fol. 69] UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD—Filed June 1, 1923

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated May 3rd, 1923.

David L. Podell, Attorney for Complainant. John Caldwell Myers, M. J. E., Attorney for Defendant Joab H. Banton. Samuel H. Hofstadter, Attorney for Defendant Carl Sherman.

[fol. 70] UNITED STATES OF AMERICA

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby

certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 2d day of June, in the year of our Lord One Thousand nine hundred and twenty-three and of the Independence of the said United States the one hundred and forty-seventh.

Alex. Gilchrist, Jr., Clerk. (Seal of the District Court of the United States, Southern District of N. Y.)

[fol. 71] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO PARTS OF RECORD TO BE PRINTED—Filed July 14, 1923

Whereas, the affidavits submitted in support of the motion in the case entitled Hygrade Provision Co., Inc., E. Greenebaum Co. Inc., and Guckenheimer & Hess, Inc., Complainants, against, Carl Sherman, as Attorney General of the State of New York, and Joab H. Banton, as District Attorney of the County of New York, Defendants, were the same as those submitted in the case of Lewis & Fox Company, Complainant, against The Same, Defendants, and

Whereas, the one opinion filed by the Court below in the Hygrade Provision Co. case covered the above entitled case,

It is hereby stipulated and agreed by and between the Attorneys for the respective parties hereto that the affidavits submitted in support of the motion, index No. 4, and the affidavits submitted in opposition, index No. 5, and the opinion of the Court, index No. 6, in the case of Hygrade Provision Co. et al., against Carl Sherman and [fol. 72] ano., may be incorporated by reference in the record of Lewis & Fox Company, against, Carl Sherman, and ano., and that the complete text thereof need not be set out in the papers on appeal in the above entitled case.

Dated New York, July 13th, 1923.

David L. Podell, Solicitor for Complainant. Samuel H. Hofstadter, Solicitor for Carl Sherman, as Attorney General. John Caldwell Myers, Solicitor for Joab H. Banton, as District Attorney, per F. C. B.

[fols. 73 & 74] [File endorsements omitted.]

Endorsed on cover: File No. 29,714. S. New York D. C. U. S. Term No. 404. Lewis & Fox Company, appellant, vs. Carl Sherman, as Attorney General of the State of New York, and Joab H. Banton, as District Attorney of the County of New York. Filed June 29th, 1923. File No. 29,714.